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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 125

REUBEN KEMP, JR.,

Appellant,

against

WILLIAM S. HULTS,
as Commissioner of the Bureau of Motor Vehicles,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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In the

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No. 1298

REUBEN KEMP, JR.,

Appellant,

against

WILLIAM S. HULTS,
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Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Sufficient has been set forth in the Statement as to Jurisdiction to answer appellee's contentions as to jurisdiction and as to substantiality. But in order to clarify the issues succinctly, this brief is respectfully submitted in opposition to appellee's motion to dismiss the appeal.

Jurisdiction

Whether the jurisdiction of this court rests on the federal claim that the appellee could not refuse a driver's license because of appellant's character shown in his criminal record or because of his character based on his omission of two convictions from his otherwise complete recital of his convictions in his application, the federal question is still apparent (as all the judges of the Court of Appeals explicitly recognized). In either case, the character of the appellant was used as a criterion for barring him from using the highways. Appellant contends that the right to freely move on the highways in common with others (after proving his ability to drive safely and related requirements) is as fundamental as the right to assemble or to speak. *Edwards* v. *California,* 314 U. S. 160, points in that direction.

When the appellee rejected Kemp's application solely because of his criminal record, he put in issue his right to do so. He urged that his right to pass on the moral fitness of an applicant derived from the Vehicle & Traffic Law, Section 501 (1)(a) (Record, p. 44, second paragraph). Appellant challenged the authority of appellee under the Vehicle & Traffic Law (including Section 510, subd. 3(c)) if so construed under the Federal Constitution (R. 10, paragraph "11").

In paragraph 11 of the petition (R. 10), Kemp alleged:

> "11. The provisions of the Vehicle & Traffic Law, particularly Section 510, sub. 3(c), which authorizes respondent to revoke an operator's license because of the conviction of a felony, if construed to empower the respondent to reject the application of petitioner on the grounds of a prior conviction for a felony not for a crime connected with safety in operation of a motor vehicle, or for a reason other than petitioner's physical and mental skill in operating such a vehicle, are in-

valid as an abridgement of petitioner's rights under the Constitution of the United States."

In the Court of Appeals, all the judges passed on this federal challenge. Three judges stated:

> "We hold this concealment, although it is not directly related to petitioner's fitness to drive an automobile, is a legitimate ground upon which the Commissioner may exercise his broad statutory powers and deny the petitioner an operator's license, without violating any of the petitioner's rights under the Federal Constitution."

Judge Keating's memorandum states:

> "The Commissioner has ample power to require information concerning an applicant's criminal background since, in my view, criminal conduct is reasonably related to an applicant's powers to operate a motor vehicle."

The dissenting three judges memorandum speaks for itself. It exclusively devoted itself to support appellant's contentions that the statute as construed is unconstitutional under the Federal Constitution.

Thus, all seven judges of the court passed upon the appellant's claim that using character as a test of an applicant for an operator's license was an unconstitutional exercise of power. And if there is any equivocation as to what the three judges of the majority stated, there is none as to Judge Keating and the three dissenting judges, thus making at least a total of four (a majority) judges who passed upon the constitutional question. *Raley* v. *Ohio*, 360 U. S. 423, 436.

To assure this Court, the remittitur of the Court of Appeals was amended to read as set forth on page 2 of the statement, and filed with the transcript of the record.

Because appellant was of the opinion that the *exempli gratia* that appeared in the amendment of the remittitur placed an ambiguous emphasis on the appellant's omission of prior convictions in his operator's application, appellant moved in the Court of Appeals after this case was docketed, for a further amendment to set forth what the appellant contended in that court. That court granted the motion by order dated June 9, 1966, which further amended the remittitur so as to exclude the *exempli gratia*, as follows:

> "Motion to further amend the remittitur granted; the return of the remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Petitioner contended that to deny him a driver's license for reasons not directly related to his ability to operate a motor vehicle violated his rights under the privileges and immunities clause of the Fourteenth Amendment as well as his rights under the due process clause of that amendment. The Court of Appeals held that petitioner's constitutional rights were not violated."

The order is set forth herein as Appendix A.

A certified copy of that order is to be filed in this court, simultaneously with this brief.

The order of further amendment in stating, "Petitioner contended that to deny him a driver's license for reasons not directly related to his ability to operate a motor vehicle", might be considered equivocal as to what appellant precisely contended in the Court of Appeals. To clarify any doubts, whether appellant contended that the statute is invalid if construed and applied so as to give appellee power to reject Kemp because of his criminal record, a certified copy of Appellant's Brief in the Court of

Appeals is to be filed in this court as part of the record, and nine copies thereof are transmitted herewith. See, Appellant's Brief, beginning with "Questions Presented" page 5 where the sole question of the appellee's statutory power to deny an operator's license because of the prior criminal record was challenged under the Federal Constitution. When read together with paragraph "11" of the Petition (R. 10) there can be no possible question that the statute, the claimed source of power, was challenged.

Therefore, from the foregoing, it is clear that the appellant in the Court of Appeals raised questions under the Federal Constitution which that court passed upon.

What appears to bother appellee is, as he argues, that the appellant is seeking to have the Vehicle & Traffic Law held unconstitutional when at the same time appellant is seeking a judgment directing the issuance of a license. Of course, appellant is not attacking the validity of Section 501 (1)(a) insofar as it requires that operators be competent to safely drive a car. All that appellant has contended and the Court of Appeals has passed upon, is that the statute as construed and as applied so as to deny him a license because of his character, violates appellant's federal constitutional rights. The record (R. 10), the Appellant's Brief, and the Court of Appeals make amply clear that the appellant's challenges were directed against the statute as construed and applied. Under the circumstances, jurisdiction to review by appeal lies. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *Poulos* v. *New Hampshire*, 345 U. S. 395, 402; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282.

And if appellant should be wrong in his contentions, this court may treat the appeal as an application for certiorari, 28 U.S.C. Section 2103. The judgment of the Court of Appeals is dated March 31, 1966, the notice of appeal was filed April 29, 1966 and the appeal was docketed in this court on May 10, 1966, well-within 90 days from the date of the judgment.

The Questions Are Substantial

Appellant believes that when three dissenting judges out of seven of the highest court give their opinion—"... that the statute, as now construed and applied, violates the privileges or immunities of citizens' provision of the Fourteenth Amendment to the Federal Constitution since it interferes with the common right to use the public highways (see *Williams* v. *Fears*, 179 U. S. 270, 274)" that alone should be sufficient to conclude that a substantial federal question is involved. When, in addition, it is shown that this court has never passed on the question whether the right to use a highway in common with others can be denied because of a person's moral character, there is additional ground to support the substantiality of the issues raised.

Reference is made to the Statement, pages 8-15, for additional grounds of substantiality.

Cases such as *Matter of Barsky* v. *Board of Regents*, 347 U. S. 442, relied on by appellee are not in point. That case involved the licensing of a person to practice medicine. It involved qualifications for an occupation in which a person dealt with the public. Moral qualification in such a case may be material. In the present case, however, no occupation is involved. Appellant merely seeks to use the highways in common with others.

The appellee never claimed that the appellant's application was false or that falsity was the basis for rejection. Therefore, it is rather startling to find the appellee now urge this point, undoubtedly inspired by some of the language in the opinion of the Court of Appeals. The record is very clear that the only reason for the rejection given by the appellee is the criminal record of the appellant (R. 14, par. "Thirteenth", 29, 43). The appellee, in face of the information he had about the appellant

(R. 12, 13, 14, 15, 43) from the prior application for chauffeur's license, could not have been prejudiced or misled on the second application and could not sincerely have rested his determination on that ground. That undoubtedly was the reason he did not urge that ground. Three judges of the majority rested their decision on this ground, although not urged by appellee, and although not the basis of the appellee's rejection of Kemp. But the federal issue raised and urged by Kemp, that the reason for his rejection cannot be evaded or ignored by a shift to a different ground by the highest court. *Rogers* v. *Alabama*, 192 U. S. 226; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282.

The Motion Should Be Denied and Probable Jurisdiction Should Be Noted

The spirit of our jurisprudence is that punishment for crime is for the purpose of rehabilitating an offender. It is not intended that a freed convict be disabled, indefinitely from enjoying the freedom of using the streets in common with others.

Respectfully submitted,

EMANUEL REDFIELD,
Counsel for Appellant.

APPENDIX A

Order.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Ninth day of June A. D. 1966.

Present, HON. CHARLES S. DESMOND, Chief Judge, presiding.

Mo. No. 574

In the Matter of the Application of

Reuben Kemp, Jr.,

Appellant,

For a Review of the Determination of William S. Hults, as Commissioner of the Bureau of Motor Vehicles,

Respondent.

A motion to further amend the remittitur having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution

of the United States, viz.: Petitioner contended that to deny him a driver's license for reasons not directly related to his ability to operate a motor vehicle violated his rights under the privileges and immunities clause of the Fourteenth Amendment as well as his rights under the due process clause of that amendment. The Court of Appeals held that petitioner's constitutional rights were not violated.

AND the Supreme Court of New York County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy,

GEABON KIMBALL,

(SEAL)

END